IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,

Petitioners,

—v.—

JOHN R. NOVOTNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

JUDITH LEVIN
MARGARET L. MOSES
ISABELLE KATZ PINZLER
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N.Y. 10016

THOMAS HARVEY
American Civil Liberties
Union of Pennsylvania
260 South 15th Street
Philadelphia, Pa. 19102

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

INTEREST OF THE AMICI CURIAE

This brief of the American Civil Liberties Union and the Pennsylvania Civil Liberties Union as amici curiae in support of the respondent is submitted with the written consent of all parties. The consents have been filed with the Clerk of the Court.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. The American Civil Liberties Union of Pennsylvania is the state affiliate of the ACLU operating in Pennsylvania.

Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, the American Civil

Liberties Union Foundation has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

Lawyers associated with the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), and the petitioners in Turner v. Depart. of Employment Security, 423 U.S. 44 (1975). In addition, the ACLU has acted as amicus curiae in this Court in several other gender discrimination and women's rights

cases, including most recently Orr v. Orr, ____ U.S. ____, 47 U.S.L.W. 4224 (Mar. 5, 1979) and Califano v. Westcott, No. 78-689 (U.S. Mar. 14, 1979).

THE STATUTE INVOLVED

42 U.S.C. §1985(3) provides:

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against by any one or more of the conspirators.

Statement of the Case

John Novotny, the respondent, began work with Great American Federal Savings and Loan Association ("GAF") in 1950 as a clerk, rising through the ranks to become an officer and member of the Board of Directors.[1/] He alleges that during the course of his employment the individual petitioners herein deliberately embarked upon a course of conduct which denied women employees the same opportunities for promotion and advancement as men.

Novotny complained of this conduct to the Board of Directors. Subsequently, he lost his position on the Board and was terminated from his employment. Novotny alleges that the individual petitioners

---

1/ The facts stated herein are based on the complaint, Appendix A to Brief for Petitioners at 1-7.

conspired to perpetuate their discriminatory employment practices and to terminate his employment in retaliation for his support of equal employment opportunities for women.

Novotny brought suit in the United States District Court for the Western District of Pennsylvania, alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., and a conspiracy among the individual petitioners in violation of 42 U.S.C. §1985(3). The District Court dismissed Novotny's claims, holding that the petitioners could not conspire among themselves because they were employees of a single corporation. The Court also dismissed the Title VII claim.

In a unanimous decision, the Third Circuit, en banc, reversed and remanded the district court's dismissal of both the

§1985(3) and the Title VII claims. The Third Circuit held, inter alia, that individuals who are directors and officers of a corporation can form a conspiracy in violation of §1985(3), that §1985(3) protects against conspiracies motivated by discriminatory animus against women, that Title VII is not an exclusive remedy so as to preclude a cause of action grounded on such a conspiracy, and that the commerce clause provides an adequate source of congressional power for the application of §1985(3) to protect rights established under Title VII.

SUMMARY OF ARGUMENT

All the elements of a §1985(3) cause of action set forth by this Court in Griffin v. Breckenridge, 403 U.S. 88 (1971), are met in this case. Petitioners acted in concert to deprive women of their right to equal employment opportunity. Pursuant to their conspiracy, they fired respondent Novotny for his efforts to ensure realization of those rights.

I

Individual officers and directors of a corporation must be held responsible for their concerted activities which violate the civil rights of others. To regard these individual natural persons as a single "person" is a legal fiction which is wholly inappropriate in the context of a civil rights conspiracy. Precedents in antitrust law which indicate

that officers and directors of a corporation cannot legally conspire among themselves are inapplicable to civil rights cases because antitrust laws and civil rights laws are based upon totally different policy considerations. Antitrust laws protect business and property rights; civil rights laws protect uniquely personal rights. Antitrust violations, if they are committed, may be the result of overzealous activity in the interest of the business entity. Motivation to harm others is not required for a civil antitrust conspiracy in violation of §1 of the Sherman Act. Civil rights violations can never be in the interest of any business entity. Section 1985(3) requires class based "invidiously discriminatory animus," a form of motivation unique to natural persons. The civil rights depri-

vation in the instant case occurred entirely within the business entity, thus making the fiction of a single indivisible entity particularly inappropriate here.

II

Section 1985(3) enforces rights to equal privileges and immunities under the laws and the equal protection of the laws, including acts of Congress. Although the right to be free from sex discrimination in private employment was not firmly established until enactment of Title VII in 1964, its enforcement by §1985(3) is not precluded. This Court has held that 18 U.S.C. §241, the criminal analogue to §1985(3), also enacted in 1871, is available to enforce Title II rights which, like Title VII rights, were established by the Civil Rights Act of 1964. United States v. Johnson, 390 U.S. 563 (1968).

Section 1985(3), which provides a civil remedy, should be construed at least as broadly as its criminal analogue.

The enforcement mechanisms provided by Title VII as remedies for employment discrimination are not exclusive. Alexander v. Gardner-Denver, 415 U.S. 36 (1974). Congress, repeatedly rejecting exclusive enforcement amendments to Title VII, has emphatically demonstrated its intention to expand the remedies for employment discrimination. To deny §1985(3) relief for sex discrimination while allowing it for other discrimination, encourages sex discrimination by permitting individuals to conspire to deprive women of equal employment opportunities without liability.

Petitioners here acted in concert to deprive women of their Title VII rights.

The conspiracy comes within the class-based animus limitation on §1985(3) actions set forth in Griffin v. Breckenridge, 403 U.S. 88 (1971). Although Griffin left open whether other than racial bias would be cognizable, this Court has consistently held unconstitutional state statutes denying equality to women, noting their foundation in a deeply rooted and invidiously discriminatory class-based prejudice. Orr v. Orr, decided this Term, invalidated a gender-based discriminatory alimony law because it perpetuated stereotypical notions of women's proper place. ___ U.S. ___, 47 U.S.L.W. 4224, 4228 (March 5, 1979). Section 1985(3) is not to limited race, but protects "any person or class of persons." Women, like blacks, have been consistently victimized by pervasive

class-based discrimination. Concerted action, motivated by an invidiously discriminatory animus toward women and undertaken to deprive them of federally guaranteed rights, should be actionable under §1985(3).

III

The correct analysis for determining if the commerce clause provides a source of congressional power for 42 U.S.C. §1985(3) is set forth by the Court in Griffin v. Breckenridge, 403 U.S. 88 (1971), and in cases specifically relied upon therein. In each of these cases, the Court determined that the right in question was a federal right, that it was properly grounded in the Constitution, and that the constitutional basis of the substantive right also served as the underpinning for the conspiracy statute

to protect against deprivation of that right. Thus the commerce clause, which underlies a Title VII right to be free from employment discrimination, also provides the power for Congress to prohibit a conspiracy to violate that right.

That the 1871 Congress may not have specifically identified the commerce clause as a basis of its power to enact a civil conspiracy statute is irrelevant. The presence of an adequate source of power in the Constitution, not Congress' express reliance, determines the constitutionality of §1985(3).

In this case, §1985(3) is being applied as a remedial statute to protect against violations of substantive rights established by Title VII. There is thus no merit to the assertion that §1985(3) must incorporate "affecting commerce"

standards to be grounded in the commerce clause, since that is essentially a claim that the statute creates substantive rights and must therefore incorporate substantive standards. Like other federal conspiracy statutes, §1985(3) finds its constitutional basis in the same source which empowered Congress to create the substantive right it protects.

Federal conspiracy statutes have been held to protect federal rights grounded in the commerce clause, such as rights created by Title II of the Civil Rights Act of 1964 and the right to travel. Rights under Title VII, a federal statute passed pursuant to the commerce clause, are similarly within the reach of the conspiracy prohibition of §1985(3).

IV

The question whether a conspiracy to violate Title VII rights can be based on the Thirteenth Amendment was not resolved below and should be deferred. If this Court should nonetheless consider the issue, recent decisions indicate that Thirteenth Amendment protection is no longer limited to persons whose ancestors have been slaves, and should extend to protect individuals against sex-based animus.

ARGUMENT

INTRODUCTORY STATEMENT

In this case, respondent Novotny seeks relief under 42 U.S.C. §1985(3) for his wrongful discharge from the Great American Federal Savings and Loan Association ("GAF"). The facts of this case fully satisfy the four essential elements of §1985(3) set forth by this Court in Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971). In his complaint, Novotny alleged that directors and employees of GAF:

(1) conspired,

(2) for the purpose of depriving women of their Title VII right to equal opportunity in private employment.

(3) In furtherence of the object of the conspiracy they discharged Novotny because of his advocacy of equal employment rights for

women, and

(4) injured him as a direct result of their actions.

The Court below held, without dissent, that respondent Novotny had properly alleged a §1985(3) cause of action. Novotny v. Great American Federal Savings & Loan Association, 584 F.2d 1235 (3d Cir. 1978) (en banc). In order to affirm the decision of the Third Circuit, this Court must decide certain statutory and constitutional questions explicitly left open in Griffin. However, amici think it important to emphasize the issues this case does not raise and which this Court need not resolve.

First, the Griffin Court, concerned lest §1985(3) be interpreted as a general federal tort law, construed §1985(3) to be limited to those conspiracies motivated by a "racial

or perhaps otherwise class-based" animus. 403 U.S. at 102 (emphasis added). The specific kinds of class-based animus other than race which would meet this requirement have not been determined by this Court. However, in order to affirm the decision below this Court need not decide whether "otherwise class-based discriminatory animus" extends to classes other than those based on gender.

Second, in order to hold that §1985(3), which protects persons from deprivations of "equal protection of the laws, or of equal privileges and immunities under the laws," extends to equal employment rights established by Title VII, this Court need not decide whether §1985(3) encompasses any other statutory or constitutional rights. Nor need this Court decide whether §1985(3) itself provides any substantive rights.

Third, in order to uphold the ruling below that application of §1985(3) to the facts of this case is constitutional by virtue of the commerce clause, this Court need not reach the constitutional questions involving the Thirteenth or Fourteenth Amendments.

I.

THE THIRD CIRCUIT CORRECTLY HELD THAT THE OFFICERS AND DIRECTORS OF A SINGLE CORPORATION MAY FORM A CONSPIRACY WITHIN THE MEANING OF 42 U.S.C. §1985(3).

A. The Single Entity Theory Is Inappropriate in the Context of Civil Rights Violations.

Respondent Novotny alleged in his complaint that the petitioners, various individually named officers and directors of the Great American Federal Savings and Loan Association ("GAF"), conspired to deprive women employees of GAF of their civil rights and that when he repeatedly protested these discriminatory practices the petitioners conspired to and did terminate his employment. Petitioners have argued below, and to this Court, that the conspiracy allegation fails to state a claim. They contend that officers and directors of a single corporation cannot be regarded as separate "persons" for the

purposes of forming a conspiracy to deprive an individual of a civil right. Rather, petitioners argue that corporate officials rank as a single legal actor -- the corporation -- whenever noncriminal liability is at stake. To support their position, petitioners indiscriminately lump together legislation designed to regulate the behavior of economic units and legislation directed to the accountability of private actors for effecting civil rights deprivations.

The Third Circuit, en banc and without dissent, rejected this argument and held that the individually named officers and directors were each "persons" capable of engaging in a conspiracy within the meaning of 42 U.S.C. §1985(3). Novotny v. Great American Savings & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978). The Court noted that Plaintiff

named individual officers and directors, not the corporation itself, as the asserted conspirators. Id. at 1258. On this basis, the Third Circuit distinguished cases in other Circuits, which have held that officers and directors are incapable (with certain exceptions) of conspiring with their corporation employer in violation of §1985(3). See, e.g., Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). However, to the extent that the decision below conflicts with Dombrowski, amici support the Third Circuit position. Amici respectfully sumbit that a single entity rule, necessarily founded upon policy and precedent relevant to the competitive behavior of business enterprises, is inappropriate in the unique arena of civil rights enforcement.

B. The Law Prohibiting Antitrust Conspiracies and the Law Prohibiting Civil Rights Conspiracies are Based Upon Totally Different Policy Considerations.

Petitioners rely on Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), cert. denied 345 U.S. 925 (1953), an antitrust case in which the plaintiff alleged that Motorola had conspired with certain of its officers, employees and agents, in violation of §1 of the Sherman Act. The court, rejecting plaintiff's conspiracy claim on the rationale that a corporation, which acts only through its officers, directors, and agents is incapable of conspiring through them with itself, departed from earlier cases which had arrived at the contrary result. See, e.g., Egan v. United States, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943)(criminal); White Bear Theatre Corp.

v. State Theatre Corp., 129 F.2d 600 (8th Cir. 1942)(antitrust); Mininsohn v. United States, 101 F.2d 477 (3d Cir. 1939)(criminal); Patterson v. United States, 222 F. 599 (6th Cir.), cert. denied, 238 U.S. 635 (1915) (antitrust); Schoedler v. Motometer Gauge & Equip. Corp., 134 Ohio St. 78, 15 N.E. 2d 958 (1938)(tort). However, the continued vitality of the general rule that officers and directors of a single corporation are legally capable of engaging in a criminal conspiracy is not questioned. See, e.g., Alamo Fence Company of Houston v. United States 240 F.2d 179 (5th Cir. 1957); United States v. Consolidated Coal Co. 424 F. Supp. 577 (S.D. Ohio 1976), Brief of Petitioner at pp. 11-16. The issue presented here, therefore, is whether civil rights conspiracies such as the one alleged by respondent should be governed by the policy considerations

relevant in antitrust contexts, or by considerations uniquely appropriate to deprivations of an individual's rights to non-discriminatory treatment.

Policies underlying antitrust conspiracy decisions are different from and inapplicable to civil rights conspiracy cases such as the one at bar. Antitrust is entirely a commercially oriented branch of law.

Section 4 of the Clayton Act creates a cause of action for injuries to "business or property by reason of anything forbidden in the antitrust laws...." (emphasis added) (§4 Clayton Act, 15 U.S.C. §15). Courts have consistently denied standing under §4 to plaintiffs who have alleged injury to their civil rights, see, e.g., N.A.A.C.P. v. New York Clearing House Ass'n, 431 F. Supp. 405 (S.D. N.Y. 1977), or to their personal

rights, see, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir. 1972), cert. denied, 411 U.S. 938 (1973); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978), cert. granted, 47 U.S.L.W. 3463, Jan. 9, 1979 (U.S. No. 78-690).

Officers, directors and employees of a corporation are hired to strengthen the corporation's competitive position in the marketplace. If, in the performance of their official duties to advance the corporation's business interests, such officers violate antitrust laws, that activity presumably results from the overzealous pursuit of the corporation's legitimate business interests. The distinction between vigorous but permissible competitive behavior and

overly competitive illegal conduct can be unclear. Note, Intracorporate Conspiracies under 42 U.S.C. §1985(c), 92 Harv. L. Rev. 470, 481-82 (1978). But in all cases, a violation retains its character as a corporate, not an individual act, undertaken to promote corporate interests.

Section 1 of the Sherman Act was not intended to regulate activity within a business entity, but to prevent restraints of trade through the concerted activities of independent business entities. Unlike §1985(3), civil actions brought under §1 of the Sherman Act require no allegation of motivation. However, to the extent that a motivating force can be identified as leading to an antitrust violation, that motive would be the enhancement of the corporation's business position.

Section 1985(3), however, was intended to regulate personal rather than economic behavior. It was intended to redress harm that transcends commercial interests. Discrimination against an individual because of her race, sex, religion or national origin stifles her urge to contribute to society, depresses her concept of her own worth, and leads her to accept a second class self image. The damage such discrimination occasions not only to the immediate victims, but to the larger community, is enormous.

While there may be sound reasons, grounded in the need to permit a meaningful intracorporate decision-making process pertaining to economic issues, to recognize the fiction of the corporation as a unitary

entity in the antitrust context,[2] no such rationale can be proffered in the context of §1985(3). As the Third Circuit said in the instant case:

> The considerations which shape this antitrust doctrine, rooted in the tension between the policy of preserving and fostering competition and the interest in not intermeddling unnecessarily in the internal entrepreneurial decisions of companies, do not lie parallel to the balance of concerns embodied in §1985(3). For example, while almost any decision by a corporation may have an effect on competitors, and thereby come within the potential purview of the the antitrust law, cf. Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918), only a limited number of de-

2/ Government enforcement agencies might dispute this conclusion even as applied in antitrust cases. See, e.g., Lorain Journal Co. v. United States, 342 U.S. 143 (1951), in which the government alleged a conspiracy by a corporation and its officials under §1 of the Sherman Act. The Court found an attempt to monopolize under §2 and did not rule on the §1 claim.

> cisions will impact on 'equal protection' and 'equal privileges and immunities.' Conversely, while courts have interpreted economic efficiencies and pro-competitive effects to constitute justifications for certain restraints of trade we discern no indication that similar defenses would protect a conjuration to deprive a minority of equal rights.
> 584 F.2d at 1258, n. 121.

Unlike close questions under antitrust laws, anti-civil rights activities cannot be said to benefit the corporation in whose name they are perpetrated. On the contrary, such activities detract from the optimal utilization of human resources. For the corporation and the nation, they are tragic, wasteful endeavors.

Activities violative of the antitrust laws are at least undertaken to, and may in fact, advance the goal of increased corporate profits. But denial of equal opportunities to women cannot be justified under any

circumstance as furthering any cognizable corporate goal. No corporate interest is advanced if a necessary function is performed by a man instead of a woman. Furthermore, the distinction between legal and illegal behavior under §1985(3) is clear. There is no continuum of behavior which may subtly shift from permissible to impermissible. Finally, in contrast to antitrust conspiracies, the element of motive is critical to a violation of §1985(3). "Class based, invidiously discriminatory animus" grows out of the personal prejudice and bigotry of the decision makers. Such motivations are uniquely attributable to natural persons.

C. Corporate Directors and Officers Should Not Be Shielded from Liability for their Concerted Activities to Violate the Civil Rights of their Employees.

An individual who becomes a director, officer or agent of a corporation does not thereby lose his or her identity as a natural person. Although a corporate "person" surely acts only through its officers and directors, the officers and directors remain natural persons who can act unilaterally or in concert with other natural persons. Individual officials of a municipal corporation, acting nominally on behalf of the city, have been found to have conspired within the meaning of §1985(3), see, e.g., Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975), and no sound reason exists in the present context to insulate the individuals here from responsibility

for their illegal activities.[3/]

3/ Contrary to the petitioners' implication (Brief of Petitioner at 13), respondeat superior does not relieve corporate officials of individual liability. Officers, directors and agents remain liable for the wrongs they commit as agents of the corporation. See, e.g., 3A W. Fletcher, Cyclopedia of the Law of Private Corporations §1135 (Rev. ed. 1975); Restatement (Second) of Agency §343 (1958); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1142-46 (4th Cir. 1975). Respondeat superior provides the injured party a remedy against the enterprise, generally a more secure source of funds, in addition to the remedy available against the employee-wrongdoer. In short, invocation of respondeat superior in this context is perverse. Petitioners would turn a rule intended to give the victim recourse to business entities as well as individuals into a rule that would immunize both the corporation and the flesh and blood agent.

Dombrowski and Cole v. University of Hartford, 391 F. Supp. 888 (D. Conn. 1975) raise the theoretical possibility of a corporation organized specifically to deprive persons of protected civil rights and conclude that such a group would be denied the protection conferred by corporate status.[4/] In practice, however, the risk

4/ Petitioners improperly argue (Brief of Petitioner at 17) that the Third Circuit has in essence pierced GAF's "corporate veil," and that the corporate veil can only be pierced if the corporation itself is a sham or organized for unlawful purposes. Piercing the corporate veil is inapplicable in this context. The genesis of the "piercing" analysis is the established rule that a corporation is an entity separate from its shareholders. In the ordinary case, this separation is recognized and a corporation cannot be held liable for the obligations of its shareholders, and a shareholder cannot be held liable for the obligations of the corporation. The doctrine simply has nothing to do with the question of whether officers, directors, or employees of a corporation can be treated as individuals capable of entering into a conspiracy in violation of §1985.

is real that an existing corporate entity, formed for and pursuing legitimate business purposes, may be abused by its officers and directors to shield their discriminatory conduct.

The conspiracy alleged in this case is distinguishable from decisions upon which petitioners rely in that all the parties were employed by GAF. Novotny, no less than the petitioners, was an officer of the corporation. Many of the women who were victims of the concerted discriminatory policies of the petitioners were also agents and employees of that same corporate "person". Thus, unlike Nelson Radio, Dombrowski, [5]

[5] In Dombrowski, the Seventh Circuit concluded that "if the challenged conduct is essentially a single act of discrimination by a single business entity... the act itself will normally not constitute the conspiracy contemplated by this statute." (emphasis added) 459 F.2d at 196. In Rackin
[Footnote continued on next page]

and Girard v. 94th Street and Fifth Avenue Corp.,530 F.2d 66 (2d Cir.), cert denied, 425 U.S. 974 (1976), where the alleged victims were "outside" third parties such as a customer and prospective tenants, the injury resulting from the conduct in issue was inflicted on the corporation's own employees. The challenge here is not from without but from within. Whatever shield may protect the corporate identity of the petitioners from external assault should not

[Footnote continued]

v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974), the court held that plaintiffs had stated a claim for a violation of §1985(3) in view of allegations defendants had committed many continuing acts of discrimination. Id. at 1005-06. Similarly, in the instant case respondent has alleged a continuing course of discriminatory conduct, over an eight year period, as detailed by the Third Circuit at 584 F.2d at 1237 n. 1, which culminated with his termination. Thus, this case falls within an announced exception to the general rule in Dombrowski.

protect them from employee claims arising from within the structure itself.

Immunity should not be extended to conspiracies to deprive persons of their civil rights which, although hatched in the corporate boardroom or executive suite, do not and cannot redound to the benefit of the corporation in whose name they are conveniently cloaked. To maintain the fiction that the individual petitioners are a single indivisible corporate entity would result in a distortion of reality, and lead to the evasion of a just responsibility. It would exalt a legal form over the common sense fact. Thus, amici urge that this Court give effect to the rule recognizing that individual officers and directors of a single corporation are legally capable of forming a conspiracy in violation of 42 U.S.C. §1985(3).

II.

SECTION 1985(3) APPLIES TO CONSPIRACIES TO DEPRIVE WOMEN OF EQUAL EMPLOYMENT OPPORTUNITIES.

A. Rights Established by Title VII Are Protected by Section 1985(3).

Respondent seeks to redress under §1985(3) his discharge from GAF for his efforts to vindicate the right of women to equal opportunity in private employment -- a right established by Congress in Title VII of the Civil Rights Act of 1964. Accordingly, this case raises two questions not before the Court in Griffin: First, does §1985(3) prohibit conspiratorial interference with federal statutory rights; and second, does §1985(3) provide a remedy for the violation of rights established after its enactment.[6/] Nothing on the face

---

6/ Specifically, this Court need only decide whether claims for violations of Title VII alleging animus are cognizable. It need not

[Footnote continued on next page]

of §1985(3), in its legislative history, or in its application by this Court requires or even suggests that it is not available to remedy violations of Title VII rights.[7/]

1. Section 1985(3) applies to federal statutory rights.

Petitioners' contention that the statute provides a remedy only for violations of fundamental constitutional rights and not for the infringement of rights created by federal statute (Brief of Petitioner at 25-34) flies in the face of the plain meaning of the statutory language. On its face,

[Footnote continued]
decide whether violations of Title VII resulting from a disparate impact on the protected class are actionable or whether §1985(3) provides a remedy for rights created by state law.

7/ Title VII likewise does not preclude the remedy. (See § C infra.)

§1985(3) applies generally to deprivations of "equal protection of the laws, or equal privileges and immunities under the laws." "Laws" plainly include acts of Congress.

Finding no basis for their argument in the language of §1985(3), petitioners attempt to suggest that this Court's rulings in Griffin v. Breckenridge and United States v. Price, 383 U.S. 787 (1966) limit the application of §1985(3) to constitutional rights. That argument is similarly without merit. Although the Griffin Court construed §1985(3) to apply to certain fundamental constitutional rights, it did not exclude statutory rights from the section's coverage.[8/]

8/ The Griffin petitioners apparently did not even allege infringement of statutory rights. 403 U.S. at 90.

In Price, the Court construed the scope of 18 U.S.C. §241, characterized in Griffin as "the closest criminal analogue to §1985(3)." 403 U.S. at 98. Section 241 reaches conspiracies to interfere with rights "secured . . . by the Constitution or laws of the United States . . . ." There, the lower court had dismissed indictments brought under §241, holding that the statute did not cover criminal conspiracies to violate Fourteenth Amendment rights. Reversing, this Court held that the statute extended to Fourteenth Amendment rights. It did not hold, as petitioners would suggest, that the statute was limited to constitutional rights. In fact, this Court had previously held that the predecessor of §241 prohibited criminal conspiracies to abridge federal statutory rights under the Homestead Act. United States v. Waddell, 112 U.S. 76 (1884).

2. Section 1985(3) provides a civil remedy for the violation of rights established after its enactment.

Section 1985(3) is not limited by its language to those rights firmly established at the time it was enacted in 1871. Justice Holmes, writing for the majority in United States v. Mosley, 238 U.S. 383 (1915), addressed the scope of the civil rights acts in changing times:

> . . .we cannot allow the past so far to affect the present as to deprive citizens of the United States of the protection which, on its face, §19 [now §241] most reasonably affords. 238 U.S. at 388.[9]

In United States v. Johnson, 390 U.S. 563 (1968), this Court held that §241, originally enacted in 1871, was available

[9] Mosley held §19 [now §241] applicable to non-violent conspiracies contrary to the suggestion of Amicus Curiae Equal Employment Advisory Council. (cf. Brief of Amicus Curiae at 8-9).

to enforce the "right to service in a restaurant," a right which existed "at least by virtue of the 1964 Act." Id. at 565-66. The Johnson indictment "did not allege injury to any rights other than those established by Title II of the Civil Rights Act of 1964." Id. at 568 n. 2 (dissenting opinion).

It would defy settled rules of statutory construction to construe a law establishing a civil remedy more narrowly than one imposing criminal liability. If §241 applies to later established federal statutory rights, §1985(3) is, a fortiori, applicable to such rights.

B. Title VII and §1985(3) Provide Complementary Remedies For Employment Discrimination.

1. Title VII's remedies for sex discrimination in private employment are not exclusive.

The clear thrust of this Court's decisions in Alexander v. Gardner-Denver, 415 U.S. 36 (1974), and Johnson v. Railway Express Agency, 421 U.S. 454 (1975), is that Title VII does not supplant or interfere in any way with rights or remedies created by other statutes.[10] The existence of multiple avenues for the redress of injuries arising from discrimination in employment is integral to Title VII. For example, initiation of a proceeding in one forum does not preclude liability in another.[11]

10/ This Court has also refused to find that the provisions of the 1964 and 1968 Civil Rights Acts prohibiting private discrimination in public accomodations and housing preclude a remedy under 42 U.S.C. §1982, derived from the Civil Rights Act of 1866. Sullivan v. Little Hunting Park, 396 U.S. 229, 237-38 (1969); Jones v. Mayer Co., 392 U.S. 409, 413-17 (1968)..

11/ Section 708 specifically preserves the efficacy of state and local laws regulating employment discrimination. 42 U.S.C. §2000e-7.

Writing for a unanimous Court in Alexander v. Gardner-Denver, Justice Powell observed that in enacting the Civil Rights Act of 1964, which included Title VII, "Congress indicated that it had considered the policy against discrimination to be of the 'highest priority'" and that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47.

The following year, in Johnson v. Railway Express Agency, this Court unanimously reaffirmed that the "aggrieved individual . . . is not limited to Title VII in his search for relief."[12/] 421 U.S. at 459.

12/ Brown v. General Services Administration, 425 U.S. 820 (1976) holding Title VII's §717 an exclusive remedy for employment discrimination by the federal government, is not
[Footnote continued on next page]

That case demonstrates that the full range of statutory remedies is essential to overcome deeply-rooted discriminatory practices and habits. The purpose of Title VII would be undermined if that statute were held to foreclose pursuit of other remedies.[13/]

[Footnote continued]
applicable to this case. Distinguishing Alexander and Johnson, the majority took great care to confine its holding to federal employment. Id. at 833. Johnson, which held Title VII remedies not exclusive in the private sector, was also a race discrimination case. Petitioners fail in their attempt to read Brown to overrule by implication the unequivocal holding in Johnson.

13/ Alexander held cases precluding suit under the Labor Management Relations Act after an individual's election of negotiation or arbitration inapposite. Deference to the primacy of conciliatory mechanisms in those cases serves the purpose the LMRA was designed to serve. Unlike Title VII, the purpose of the LMRA is "industrial peace." 415 U.S. at 46. This Court should firmly reject petitioner's invitation to retreat from that well-established precedent.

Congress clearly intended for Title VII to be a non-exclusive remedy for discrimination by private employers. This Court has noted Congress' repeated rejection of proposed amendments to Title VII, which would have made Title VII remedies exclusive. Alexander v. Gardner-Denver, 415 U.S. at 48 n. 9; Johnson v. Railway Express, 421 U.S. at 459. As the House Report accompanying the 1972 Equal Employment Opportunity Enforcement Act, which amended Title VII, makes clear: "Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination." H.R. Rep. No. 238, 92nd Cong.; 2d Sess. 18019 (1972). (Emphasis supplied.) Senator Williams, one of the original sponsors of the 1972 amendments, explained that the

1972 legislation was "premised on the continued existence and vitality of other remedies for employment discrimination." 118 Cong. Rec. 3371 (1972).

Section 1985(3) of the 1871 Civil Rights Act is among those other remedies. In 1972 the Senate rejected an amendment to the Equal Employment Opportunity Enforcement Act that would have made Title VII and the Equal Pay Act the exclusive means of redressing discrimination in employment. 118 Cong. Rec. 3371-72 (1972). Senate defeat of the futile attempt to confine the remedies available to individuals aggrieved by employment discrimination demonstrates that Title VII and the 19th century Civil Rights Acts were to continue side by side in the nation's commitment to equal opportunity. To exclude §1985(3) from the array of independent reme-

dies available to persons injured by discriminatory employment practices would be to contradict explicit indications of congressional intent.

Consistent with the congressional mandate that Title VII expand the remedies available for employment discrimination, the Sixth Circuit has ruled that §1985(3) is available to remedy private employemnt discrimination on the basis of religion, which, like sex discrimination, was not expressly prohibited in private employment before enactment of Title VII. Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973).

Ignoring Marlowe, petitioners rely on Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976), for their contention that §1985(3) should not be interpreted to remedy sex discrimination in private employment.

The Fourth Circuit, although acknowledging that this Court "made clear [in Alexander v. Gardner-Denver Co., and Johnson v. Railway Express Agency] that Title VII was not intended to preempt other remedies," restricted this clear and controlling precedent to rights "preexisting or independent" of Title VII. Id. at 1334. Finding "no federal right [to be free from sex discrimination in private employment] prior to the enactment of Title VII," and mistakenly reasoning that Congress "intended the procedures under [Title VII] to be the exclusive mechanism for effectuating rights created by the statute," the court held that §1985(3) is not an available mechanism to enforce rights created by Title VII. Id.

The misleading distinction between pre-existing rights and pre-existing remedies

was never considered by Congress when it unequivocally provided that the enforcement mechanisms of Title VII not be exclusive.[14/] Confining victims of sex discrimination to Title VII remedies while permitting victims of other forms of discrimination to pursue all available remedies not only thwarts the clear congressional purpose to expand the remedies for employment discrimination but also encourages sex discrimination by allowing individuals to act in concert to deprive women of equal employment opportunities without liability.

14/ That §1985(3) provides a remedy for violations of rights deriving directly from the Constitution or established by other statutes does not mean that it is devoid of substantive elements. Whether §1985(3) creates a substantive right to be free from employment discrimination is not before this Court. In the context of this case, however, §1985(3), together with Title VII, guarantees the right to be protected against individuals who, motivated by a gender-based animus, conspire to discriminate against women in private employment. (See Section II(B)(2), infra).

The Doski court did not address the ruling of this Court in United States v. Johnson, 390 U.S. 563 (1968) that 18 U.S.C. §241, originally enacted in 1871 and the criminal analogue to §1985(3), can be used to enforce rights established by Title II of the 1964 Act. (See Section II(A)(2), supra). Title II provides that its enforcement mechanisms "shall be the exclusive means of enforcing rights based on this subchapter," although it permits litigants to pursue all available remedies to enforce other rights.[15/] 42 U.S.C. 2000a-6(b). The distinction drawn by the Doski court in its Title VII analysis coincides exactly with the statutory language of Title II. In contrast to Title II, however,

15/ The dissent in Johnson expressed concern only about the explicit exclusivity of Title II. 390 U.S. at 568- 69.

Title VII does not provide that its remedies are the exclusive means of enforcing the rights it establishes. The Johnson Court refused to construe the explicit language of Title II to constrict enforcement of Title II rights in that case.[16/] Therefore, this Court should not curtail the remedies available to enforce Title VII rights here.

2. Section 1985(3) provides a necessary remedy in this case.

The thrust of Title VII is to protect against practices of companies and unions, not against acts of individuals. Here, Novotny claims redress for the concerted actions of his co-directors and fellow

16/ Petitioners cannot escape liability under §1985(3) by analogizing from the Johnson dictum that proprietors who believed their establishments were not covered by Title II could not be held criminally liable for violations of the title until they had had an opportunity to litigate its applicability. 390 U.S. at 565. Petitioners here clearly knew, or should have known, that their employment practices were covered by Title VII.

employees to deprive women of equal employment opportunities. Unlike Title VII, §1985(3) clearly provides for full compensatory and punitive damages, which may be appropriate in this case.

Arguing against the proposed "exclusive enforcement" amendment prior to its second rejection in 1972, Senator Jacob Javits, co-author of the 1972 amendments, noted the importance of the 1871 civil rights statutes in reaching third parties guilty of discrimination.

> There are other remedies, but those other remedies are not surplusage . . . The methodology in Title VII is a unitary thing, it pits the individual against the employer; it does not affect third parties. There have been cases in which third parties have been guilty of bringing about the discrimination. 118 Cong. Rec. 3961-62 (1972).

The same view was persuasively presented by Senator Williams:

> The law against employment discrimination did not begin with Title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in federal courts to redress individual acts of discrimination, including employment discrimination, was first provided by the Civil Rights Acts of 1866 and 1871 . . . .118 Cong. Rec. 3371-72 (1972).

The right to be free from concerted action by individuals to interfere with rights established in Title VII, was one which Congress, in rejecting an exclusive enforcement amendment to Title VII, clearly sought to ensure. Section 1985(3) is indispensible to the full enjoyment of that right.

C. The Requisite Class-Based Animus Is Present In This Case.

To avoid "[t]he constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law. . . "

this Court in Griffin v. Breckenridge, construed

> [t]he language requiring intent to deprive of equal protection, or equal privileges and immunities . . . [to mean] that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. [footnote omitted]. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. [footnote omitted]. 403 U.S. 88, 102 (1971). [emphasis in original].

Griffin left open "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under . . . §1985(3)." Id. at n. 9. The question here is whether a conspiracy motivated by sex bias satisfies the animus requirement. This Court need not decide whether any other discriminatory animus would be actionable.

Since Griffin, no court has ruled that gender based discrimination is outside the scope of §1985(3).[17/] Indeed, petitioners do not appear to contest that a conspiracy motivated by sex bias is actionable. Prior decisions of this Court and the language and legislative history of §1985(3) compel the conclusion that discrimination against women

17/ In addition to the Third Circuit, the Eighth Circuit has held gender motivated conspiracies actionable under §1985(3). Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978). Two circuits, in refusing to find class-based animus in the cases before them, have indicated that conspiracies motivated by sex bias would be cognizable under §1985(3). Meiners v. Moriarity, 563 F.2d 343, 348 (7th Cir. 1977); Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976); McClellan v. Mississippi Power and Light Co., 545 F.2d 919, 932 n. 78 (5th Cir. 1977) (en banc). In fact, most §1985 claims dismissed on class-based animus grounds failed even to allege or raise the animus issue. E.g., Dacey v. Dorsey, 568 F.2d 275 (2d Cir. 1978); Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977); Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977); [Footnote continued on next page]

is the type of class-based invidious discrimination the statute was designed to prohibit.

This Court's decisions make clear that discrimination based on sex is an invidious, deeply-rooted example of class-based animus. Gender-based classifications "reinforcing stereotypes about the 'proper place' of women . . ." have been repeatedly held unconstitutional. Orr v. Orr, 47 U.S.L.W. 4224, 4228 (March 5, 1979). See also, Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 321 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson,

[Footnote continued]
Regan v. Sullivan, 557 F.2d 300 (2d Cir. 1977); Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977); Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976); Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972).

411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Mr. Justice Blackmun, writing for the majority in Mathews v. Lucas, 427 U.S. 495, 506 (1976), observed that sex, like race, is an "obvious badge" and noted "the severity [and] pervasiveness of the historic legal and political discrimination against women. . . ." This is the very kind of class-based invidious discrimination that §1985(3) was enacted to remedy.[18/]

18/ The fact that Novotny is not a member of the class discriminated against does not bar his action. The statute itself provides that where, as the result of conspiratorial acts, "another is injured in his person or property, or deprived of having and exercising any right or privilege. . . the party so injured or deprived may have an action. . . ." (emphasis supplied). The Court below reviewed extensive legislative history revealing a congressional intent to protect not only the persons against whom the conspiratorial animus is directed but those "who by any means attract attention as [their] earnest friends . . . ." Cong. Globe, 42nd Cong., 1st Sess. (1871), App. 78 (Rep. Perry); 584 F.2d at 1244. [Footnote continued on next page]

The language of §1985(3) does not limit the statute's reach to conspiracies motivated by racial bias. Nor does the legislative history. Although the statute was passed in large part to protect the black population of the post-war South, no effort was made to limit its coverage to blacks. In contrast to the Civil Rights Acts of 1866 and 1870, which bestow upon others rights enjoyed by "white citizens," the 1871 Act, of which §1985 is a part, expressly applies to "any person." This Court has repeatedly stated that the civil rights acts, including §1985(3), should be "'accord[ed]. . . a sweep

[Footnote continued]
This Court has repeatedly held that white persons injured because of their advocacy of racial integration may seek redress under those statutes enacted to end discrimination. Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969); Adickes v. Kress & Co., 398 U.S. 144 (1970). Similarly, men have been permitted to raise discrimination against women when they have been injured by it. Duren v. Missouri, ___ U.S. ___, 58 L. Ed.2d 579 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

as broad as [their] language.' United States v. Price, 383 U.S. 787, 801 . . . ." Griffin v. Breckenridge, 403 U.S. at 97 (1971).

Although the legislative history on the statute's applicability to women as a class is sparse, there is no indication that Congress intended to exclude women from the protection of the act. To the contrary, Congress was informed that the law would cover women. Representative Kelley of Oregon asserted that the duty of Congress in enacting the 1871 Act was to "protect the humblest man within its limits, [to] snatch from oppression the feeblest woman or child . . . ." According to Representative Shellabarger, one of the bill's sponsors, the purpose of the law was to remedy "any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not

enjoy equality of rights as contrasted with his and other citizens' rights . . . ." Congressional Globe, 42nd Cong., 1st Sess. 478 (1871). It is precisely for this stated purpose that respondent Novotny invokes the protection of § 1985(3).

III.

THE COMMERCE CLAUSE AUTHORIZES THE APPLICATION OF § 1985(3) TO REDRESS INJURIES FOR VIOLATIONS OF RIGHTS SECURED BY TITLE VII.

A. The Source of Congressional Power to Reach a Private Conspiracy is the Same as the Source of the Substantive Right Allegedly Infringed.

In Griffin v. Breckenridge, this Court held that § 1985(3) prohibits private conspiracies by individuals to deprive another of equal protection of the laws or equal privileges and immunities under the laws. To invoke the protection of the statute, the Court held that it is necessary "to [identify] a source of Congressional power to reach the private conspiracy alleged by the complaint. . . ." 403 U.S. at 104.

The rights infringed in Griffin -- to be free from badges and incidents of slavery, and to travel freely between states -- were found by the Court to be federal rights properly grounded in the Thirteenth Amendment and the Constitutional power to protect interstate travel. Griffin makes clear, however, that the identification of these two sources of Congressional authority does "not imply the absence of any other." 403 U.S. at 107.

The Court's analysis in Griffin demonstrates that when Congress acts pursuant to the commerce clause to create a substantive right to be free from discrimination in employment, the same source of power authorizes the prohibition of private conspiracies designed to infringe

that right. This analysis relied upon earlier constructions of 18 U.S.C. § 241, "a criminal statute of far broader phrasing [than § 1985(3)]" which "reaches wholly private conspiracies, and is constitutional." 403 U.S. at 104.

The Court first upheld the constitutionality of 18 U.S.C. § 241, then R.S. 5508, in Ex Parte Yarbrough, 110 U.S. 651 (1884). The defendants had been charged with conspiring to interfere with the right to vote in a Congressional election. This Court found that the Constitution empowered Congress to regulate the time, place and manner of Federal elections, and to enforce the Fifteenth Amendment, and held that the same sources of power authorized

application of the conspiracy statute to prohibit interference with the right to vote. Laws such as R.S. 5508, passed by Congress to protect this right "stand upon the same ground and are to be upheld for the same reasons." 110 U.S. at 662. The Congressional power to enact such laws "arises out of the . . . [fact that] the right which [the party] is about to exercise is dependent on the laws of the United States." Id.

Eight months after Yarbrough was decided, this Court confronted another challenge to the constitutionality of R.S. 5508. In United States v. Waddell, 112 U.S. 76 (1884), R.S. 5508 was invoked to reach a private conspiracy to deprive an individual of his statutory right to perfect title to land under the federal Homestead Acts, R.S. 2289-2291.

The Court found the source of Congressional power to pass the Homestead Acts to be in Article IV, Section 3 of the Constitution, which vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. 112 U.S. at 79-80. Concluding that this same source provided the constitutional underpinning of the conspiracy statute, the Court reasoned:

> Whenever the acts complained of are of a character to prevent the exercise of a statutory right or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law

> of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such a statute.

112 U.S. at 80 (emphasis added).

An analysis similar to Yarbrough and Waddell underlies Logan v. United States, 144 U.S. 263 (1892). At issue there was a conspiracy to injure persons in the custody of a federal marshal. Imposing a criminal sanction for interference with a federal function (supervision of federal prisoners) was held "necessary and proper" action by Congress. In Logan, the Court reviewed prior decisions dealing with the constitutionality of R.S. 5508, and reaffirmed the established principle that:

> ...every right, created by, arising under, or dependent upon the Constitution of the United States, may be protected...by such means and in such manner as Congress, in the exercise of ...the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

144 U.S. at 293.

In all the cases discussed above, the Court made the same three-step analysis. It first determined whether the right to be protected was a federal right. Then it considered the constitutional source for that right. Third, when the substantive right was found properly grounded in the Constitution, the Court held this constitutional base also served as the source of Congressional authority to protect the right in question under R.S. 5508 (§241). The Court

did not examine whether Congress had specifically intended the conspiracy statute to reach any particular fact situation. Rather, it focused on the constitutional authority for Congress to enact whatever statute created the substantive right in question.

In Griffin, this Court specifically relied on the reasoning of Yarbrough, Waddell, and Logan,[19] in upholding as constitutional the use of § 1985(3) to protect the rights allegedly infringed by petitioners. Writing for the Court,

---

19/ In Re Quarles, 158 U.S. 532 (1895), also relied upon by the Court in Griffin, applied the reasoning of Logan to hold that R.S. 5508 could protect against private conspiracy the right of a citizen to inform federal law enforcement officials of a violation of federal law.

Justice Stewart first analyzed the substantive rights in question, found them to be federal rights properly grounded in the Constitution, and then held that the sources of Congressional power to reach the alleged private conspiracy were the very same sources as those of the substantive right.

The three step analysis of Yarbrough, Waddell, Logan, and Griffin, as applied to the case at bar, mandates the conclusion that the commerce clause power, which authorizes Title VII, also supports application of § 1985(3) to Petitioners' conduct. First, there is no doubt that Title VII is a federal statute creating federal rights. Second, petitioners acknowledge that Title VII is validly enacted pursuant to the commerce clause. See discussion in Brief for Petitioners

at 40,42. Thus, the first and second steps of the Court's three step analysis are conceded by petitioners. The similarity of the facts in Waddell with those of the case at bar establishes the third step in the analysis. Like David Waddell, who alleged that he was unlawfully prevented by private persons from exercising his federal statutory right to perfect title to land under the Homestead Act, John Novotny is complaining of acts of individuals which obstructed the exercise of his federal right under Title VII to oppose unlawful employment

practices.[20] Because the right asserted in each case was one created by a law of the United States validly enacted pursuant to a constitutional power of Congress, a private conspiracy to interfere with this right comes within the

---

20/ Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Novotny may also have standing under section 703 of Title VII to claim the right to a discrimination-free work environment. See Waters v. Heublein, Inc., 547 F. 2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977).

purview of the federal conspiracy statutes. The congressional power underlying the conspiracy statutes is grounded in the constitutional authority to create the substantive right. In Waddell, congressional power was based on Article IV, § 3; in the instant case, it is found in the commerce clause. Petitioners have pointed to no case which casts doubt on the constitutional power of Congress to protect individuals from the interference by private parties with rights conferred by a validly enacted federal statute.[21]

21/ Petitioners rely on Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976) for the proposition that § 1985(3) does not cover private sex-based conspiracies to violate Title VII rights. The interpretation in Doski turns on a statutory construction of Title VII, and not on a claim of insufficient Congressional power

[Footnote continued on next page]

In the instant case, the Third Circuit correctly followed this Court's precedents, stating that "[t]he same authority which warrants the provision of such rights in the first place equally empowers Congress to provide sanctions against conspiracies to interfere with the equal enjoyment of rights under Title VII." 584 F.2d at 1255.

B. Express Congressional Reliance is not Required for a Finding that the Commerce Clause Fully Supports the Enactment of § 1985(3).

Petitioners argue that absent explicit commerce clause invocation by Congress, that base of federal authority must be ignored in determining the constitutionality of applying § 1985(3)

[Footnote continued]
to protect employment rights created by federal law. See discussion of statutory scope of § 1985(3) supra, at Section II (B)(1).

to a conspiracy to violate Title VII. This argument is without merit. This Court has never required as a condition to upholding the constitutionality of a statute that Congress state expressly the source of power relied upon. In Griffin v. Breckenridge, the Court reviewed and analyzed the legislative history of § 1985(3) to construe the scope of the statute, not to identify a constitutional basis for the enactment. For as the Court said in Woods v. Miller, 333 U.S. 138, 144 (1948), "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

In Griffin, this Court stated unequivocally: "That § 1985(3) reaches private conspiracies to deprive others

of legal rights can, of itself, cause no doubts of its constitutionality." 403 U.S. at 104. If the 1871 Congress did not expressly rely on the commerce clause, neither did it rely on the right to travel. Nevertheless, this Court found interstate travel to be an appropriate constitutional underpinning for the conspiracy alleged in Griffin. Similarly, other constitutional provisions, such as the commerce clause, can supply the congressional power basis to reach § 1985(3) conspiracies, whether or not the 1871 Congress specifically relied

upon them.[22]

Petitioners argue that § 1985(3) cannot appropriately be used to vindicate rights protected by Congress' commerce clause powers, claiming that the statute was intended solely to remedy "violations of the fundamental rights of citizens" which had recently been extended to blacks by the Thirteenth,

---

22/ Regarding the commerce clause as a source of power when Congress has expressly relied on a different constitutional provision, Justice Stevens said of the 1972 Title VII extension to cover state employers:

> In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on §5 of the Fourteenth Amendment. (Concurring opinion, emphasis supplied.) Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1976).

Fourteenth, and Fifteenth Amendments. Brief for Petitioners at 43. This Court's precedents make the argument untenable. A criminal analogue to § 1985(3), 18 U.S.C. § 241, has been held to protect rights grounded in a number of different constitutional provisions, including Article I, §2 (Ex Parte Yarbrough), Article IV, §3 (United States v. Waddell), and the commerce clause (United States v. Johnson). See discussion, supra, at Section III(A).

C. Section 1985(3), to Constitute Valid Commerce Clause Based Legislation, Need not Spell Out in Text "Affecting Commerce" Standards.

Petitioners argue that to rest on the commerce clause, § 1985(3) must set out standards showing that the regulated activity affects commerce. Petitioners

cite Title VII as a model, since it defines coverage in terms of employers who employ "more than 25 [sic] employees"[23] and engage in "industry affecting commerce." Brief for Petitioners at 42.

This argument collides with another that Petitioners urge -- that § 1985(3) is only a remedial, not a substantive statute. But if § 1985(3) is only remedial,[24]

---

[23] The requirement is that an employer must employ 15 or more employees. Section 701(b), 42 U.S.C. 2000e(b).

[24] The Third Circuit stated that § 1985(3) was remedial. 584 F.2d 1235, 1247. However, resolution of this question is not necessary to the disposition of the instant case since the issue is the protection of federal rights created by Title VII. The distinction between remedial and substantive legislation is significant with regard to a § 1985(3) cause of action only insofar as Fourteenth Amendment rights are at issue. In that context, the question is whether the definition of the right at issue, such as a right to equal protection, can stand alone or whether the definition must include the actor, i.e., a state official

[Footnote continued on next page]

it follows that the right it protects must exist independently. Brief for Petitioners at 37,52. There is no authority for the proposition that a remedial statute must incorporate the same substantive standards as the statute creating the substantive right. Since this case involves the use of § 1985(3) to reach employment discrimination rights created by Title VII, it is not appropriate to decide hypothetically whether the statute would need to incorporate "affecting commerce" standards to provide

---

[Footnote continued]
against whose actions the right is protected. See United States v. Guest, 383 U.S. 745, 774 (1966) (Brennan J., concurring in part, dissenting in part). See also, Comment, Civil Rights -- Section 1985(3) -- Civil Remedy Provided to Redress Interference with First Amendment Right of Religious Freedom by Private Conspiracy -- Action v. Gannon, 47 N.Y.U. L. Rev. 584, 587-88 (1972).

a substantive right.[25]

Congress determined that deprivation of a Title VII right affects commerce. A fortiori, a conspiracy which deprives a person of a Title VII right necessarily affects commerce. In the case at bar, § 1985(3) creates the remedy for such conspiracies in violation of a federal right. The source of power for § 1985(3) is the constitutional authority supporting the creation of the federal right. (See discussion, supra, at Section II(A).)

---

[25] Such a situation might arise where members of a private club were alleged to conspire to discriminate in employment. Title VII does not apply to private membership clubs. 42 U.S.C. § 2000e(b). Section 1981 might not apply because the employer was a private club. Runyon v. McCrary 427 U.S. 160 (1976).

D. Federal Conspiracy Statutes have been Held to be Grounded in the Commerce Clause.

In Griffin, this Court identified the right to travel as a source of Congressional power for the § 1985(3) conspiracy there in question. Both before and after the passage of the 1871 legislation now codified as § 1985(3), the Court acknowledged commerce clause underpinnings for a federally secured interstate travel right. Passenger Cases, 48 U.S. (7 How.) 283(1849); Crandall v. State of Nevada, 73 U.S. (6 Wall) 35, 44 (1867) (concurrence); Edwards v. California, 314 U.S. 160, 172 (1941). The majority decision in Edwards "was consistent with precedents firmly establishing that the federal commerce power surely encompasses the movement in

interstate commerce of persons as well as commodities." United States v. Guest, 383 U.S. at 758-59.

Infringement of the right to travel has been proscribed by federal conspiracy statutes for nearly three quarters of a century. Griffin v. Breckenridge, 403 U.S. 88 (1971); United States v. Guest, 383 U.S. 745 (1966); United States v. Moore, 129 F. 630, 633 (N.D. Ala. 1905). In addition to the right to travel, rights created by Title II, the public accommodations provision of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, have been held by this Court to be protected under 18 U.S.C. § 241. United States v. Johnson, 390 U.S. 563, 565 (1968). Title II was explicitly upheld as a constitutional exercise of Congress' commerce powers.

Heart of Atlanta Motel, Inc. v. United States;[26] Katzenbach v. McClung, 379 U.S. 294 (1964).

It is abundantly clear that Title VII rights, recognized as deriving from the commerce clause, can give rise to an

---

26/ Justice Clark, In Heart of Atlanta Motel, 379 U.S. 241 (1964), distinguishing the Civil Rights Cases, 109 U.S. 3 (1883), which had declared provisions of the Civil Rights Act of 1875 unconstitutional, stated: "[T]here is language in the Civil Rights Cases which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power" 379 U.S. at 251. Thus she concluded that the opinion was "devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce." Id. at 262.

action under Federal conspiracy statutes.[27]

27/ In Steele v. Louisville & Nashville Railroad Co., this Court held that the Railway Labor Act, 45 U.S.C. § 151 et seq. passed pursuant to Congress' commerce clause powers, imposed a duty on a labor organization, acting under the statute as the exclusive bargaining representative, to represent all employees without discrimination because of race. 323 U.S. 192, 203 (1944). This duty implied a correlative federal right secured by the statute. Id. at 204. Having implied a statutory right, this Court then fashioned a remedy for breach of the implied statutory duty. A fortiori, this Court can apply an express Congressional remedy, § 1985(3), for violation of an express statutory right, Title VII, created under Congress' commerce powers.

IV.

THE COURT BELOW DID NOT DECIDE WHETHER A CONSPIRACY TO VIOLATE TITLE VII RIGHTS COULD BE BASED ON THE THIRTEENTH AMENDMENT. ACCORDINGLY, THE RESOLUTION OF THAT ISSUE SHOULD BE DEFERRED.

The Third Circuit made passing reference to the possibility that Congress may reach private discrimination against women under its Thirteenth Amendment enforcement power. [28/] It then stated:

> Since the application of §1985(3) to this case finds ample support in the commerce clause, however, we need not reach this argument. 584 F.2d at 1256 n. 110.

This Court should not reach the

28/ Note, Federal Power to Reach Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 451-54 (1974).

question. [29/] Supreme Court Rule 23(1)(c) provides that "[o]nly the questions set forth in the petition for certiorari or fairly comprised therein will be considered by the Court."

The constitutional question presented for review in this case is specifically

29/ The question of whether the Fourteenth Amendment provides authorization for application of §1985(3) to private employment practices that discriminate against women is also not before this Court. Decisions discussed by Petitioners on this point, e.g., Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975), and Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (see Brief for Petitioners at 50) were limited to the state action question. These cases were based on Fourteenth Amendment claims but no state action was found. No Fourteenth Amendment claim is made in the case at bar. It is based upon a Title VII claim for which no state action is required or claimed. The Fourteenth Amendment question was not presented in the Petition for Certiorari and the court below declined, as should this Court, to address the issue. 584 F.2d at 1255.

"whether the commerce clause ... provides a source of congressional power...." Petitioner's Brief for Certiorari at 2 (emphasis supplied). Absent extraordinary circumstances not presented in the case, the Court will not consider questions not properly presented. See, R. Stern and E. Gressman, Supreme Court Practice §6.27, at 456-59 (5th Ed. 1978). The Court below did not decide this issue and supplied a full and adequate basis for its holding.

Should this Court decide, nevertheless, that it is appropriate to consider the issue, recent interpretations of the scope and application of the Thirteenth Amendment indicate that it is, indeed, an alternate basis for application of §1985(3) in the

instant case.30/

Early decisions discussing the Thirteenth Amendment established two general rules of application, the first expansive, the second restrictive:

1. Thirteenth Amendment protection is not limited to members of the black race.31/

2. Congressional power under the Thirteenth Amendment reaches only the eradication of conditions of

---

30/ For a full discussion of the Thirteenth Amendment as a source of congressional authority to prohibit sex discrimination in private employment, see Calhoun, The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation against Private Sex Discrimination, 61 Minn. L. Rev. 313 (1977).

31/ In the Slaughter-House Cases, the Court stated:

> Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the Thirteenth article, it forbids any other kind of slavery, now or hereafter. 83 U.S. (16 Wall) at 72 (1872).

slavery or involuntary servitude.[32/]

More recently, this Court has altered the second, once restrictive rule, in two ways. First, in Jones v. Alfred H. Mayer Co., the Court held that under section 2 of the Thirteenth Amendment Congress had the power to determine what are "badges and incidents" of slavery in terms of the burdens and disabilities on an individual's "fundamental rights," as well as the power to translate that determination into effective legislation. 392 U.S. at 440-41.

The question left unresolved in Jones v. Alfred H. Mayer, Co., was whether Congress' determination of "badges and incidents of slavery" depended upon a linkage between presently observable badges and incidents

32/ See Calhoun, supra n. 30 at 350-53.

and a prior legal status amounting to slavery or involuntary servitude. In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), this Court addressed that question.

The Court held in McDonald that 42 U.S.C. §1981, which implements the Thirteenth Amendment, proscribes private employment discrimination against whites as well as blacks. White persons in this country have never as a class labored under conditions of slavery. Thus, it is clear after McDonald that a Congressional definition of "badges and incidents of slavery" need not be linked to a prior legal status of involuntary servitude.

Since this Court has traditionally held that the Thirteenth Amendment authorizes legislation which reaches classes of persons

other than blacks, and since it has more recently held that Congress, acting pursuant to that Amendment, may prohibit private discrimination against whites, Thirteenth Amendment legislation should be interpreted to protect women as a class. Gender discrimination is a much more serious social and economic problem than is discrimination against white persons. 33/ Moreover,

33/ The seriousness of the economic, political, and psychological impact of sex discrimination in the United States has been well documented in the two volume report of hearings before Congresswoman Edith Green's subcommittee of the Committee on Education and Labor. Hearings before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, Ninety-First Congress, Second Session, on Section 805 of H.R. 16098, U.S. Gov't. Printing Office (1970). Government statistics reveal the extensive economic damage to women as a result of discrimination. Women who work full-time the year round average less than $60 for every $100 earned by similarly employed men. In addition, working men with college degrees earn, on

[Footnote continued on the next page]

a narrow interpretation of Thirteenth Amendment authority would produce the anomalous result that women, whose past and current legal and economic status bears a marked kinship to that of blacks 34/ would

the average, $16,000 a year while female college graduates earn $9500. The Earning Gap Between Women and Men, U.S. Department of Labor, Women's Bureau, 1976. A typical eighth-grade male graduate earns as much as a woman B.A. working full time. Hearings, supra. And the gap is increasing, not decreasing with time. The Earnings Gap Between Women and Men, supra. See also, Social Indicators of Equality for Minorities and Women, A Report of the United States Commission on Civil Rights, August, 1978.

34/ This similarity of status was noted in Frontiero v. Richardson, 411 U.S. 677 (1973):

> ...[T]hroughout much of the nineteenth century the position of women in our society was in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were

[Footnote continued on the next page]

be deprived of coverage, while white males, who have not traditionally been discriminated against, would be entitled to the full reach of the Amendment's protection.

The Court's decision in McDonald reflects a principled determination to apply Constitutional provisions in light of present circumstances, freeing the scope of Thirteenth Amendment interpretation from its historical connection with persons whose ancestors were slaves. This concern for

---

> denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.
>
> ...And although blacks were guaranteed the right to vote in 1870, women were denied even that right -- which is itself preservative of other basic civil and political rights -- until adoption of the Nineteenth Amendment half a century later.

Id. at 684-85. This Court has also observed that sex, like race, is an "obvious badge" contributing to "the historic legal and political discrimination against women" that has been severe and pervasive. Mathews v. Lucas, 427 U.S. 495, 506 (1976). See also, G. Myrdul, An American Dilemma, 1073-78 (1972).

private discrimination which relegates persons to second-class status surely must encompass protection of individuals against sex-based animus. 35/

35/ The Fair Housing Act of 1968, 42 U.S.C. §3601-3631, which has been consistently read as the Thirteenth Amendment implementing legislation (See Calhoun, supra n. 30 at 360, notes 191, 192, 51) was amended in 1974 to include sex. Pub. L. 93-383, 1974 U.S. Code Cong. and Adm. News, pp. 4349-50.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

JUDITH LEVIN
MARGARET L. MOSES
ISABELLE KATZ PINZLER

American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

THOMAS HARVEY

American Civil Liberties
Union of Pennsylvania
260 South 15th Street
Philadelphia, Pennsylvania

Attorneys for Amici Curiae*

---

* Counsel gratefully acknowledge the assistances of Molly S. Boast, a third year student at Columbia University School of Law, Ellen Levine, a third year student at New York University School of Law, and Peggy B. Rosenthal, a third year student at Hofstra University School of Law.